

1 THE HONORABLE MONICA J. BENTON
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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE WESTERN DISTRICT OF WASHINGTON

8 UNITED STATES OF AMERICA,

9 No. CR04-334-JCC

10 Plaintiff,

11 vs.
12 DEFENDANT KYLE GIANIS'S
13 MOTION FOR RECONSIDERATION
14 OF PRETRIAL DETENTION ORDER

15 KYLE GIANIS,

16 EVIDENTIARY HEARING REQUESTED

17 Defendant.

18
19 COMES NOW the defendant, KYLE GIANIS, by and through his attorneys, John
20 Henry Browne and Emma Scanlan, and moves this Court for a detention review hearing
21 and an order for conditional pretrial release that will reasonably assure the appearance of
22 the defendant and safety of the community. This motion for review and revocation of the
23 detention order is based on the fact that Mr. Gianis never received notice that he was
24 under indictment; rather, he discovered the investigation only upon being denied entry
into Mexico due to the federal warrant for his arrest in the United States. Mr. Gianis
seeks to dispose of this matter as soon as possible. Had he known that charges were
pending in the United States, Mr. Gianis would have immediately responded to refute the
allegations lodged against him. This motion is based on the files and records herein, and
the supporting memorandum of law.

21 I. FACTS RELEVANT TO MOTION

22 A. Background into the Charges Against Mr. Gianis

23 On July 22, 2004, The United States District Court for the Western District of
24 Washington issued an arrest warrant commanding the arrest of Kyle Gianis pursuant to an
indictment alleging one count of Conspiracy- Possession of Ephedrine with Intent to

1 Distribute, in violation of 21 U.S.C. §§ 841(c) and 846. Mr. Gianis, however, never
 2 received notice of the charge against him in the United States, had no reason to visit this
 3 country, and therefore has yet to face the pending allegation. Mr. Gianis did not make a
 4 conscious and deliberate decision to avoid U.S. jurisdiction; instead, he was completely
 5 unaware that the charge even existed and continued with his normal life.

6 The charge against Mr. Gianis stems from an incident on March 12, 2004, when
 7 U.S. Customs Service agents discovered approximately fifty kilograms of ephedrine in
 8 two drums located in the trunk of a vehicle occupied by Adam Tsoukalas and David
 9 Youngberg. During questioning by the Immigration and Customs Enforcement ("ICE")
 10 officers, Tsoukalas related that he was going to meet "Kyle Ganis" at the Bellis Fair in
 11 Bellingham and then go to dinner together. He revealed no incriminating information in
 12 relation to Mr. Gianis.

13 Youngberg, on the other hand, stated that he and Tsoukalas were going to meet
 14 "Kyle Guiness" at the Bellis Fair. Youngberg claimed that he and Tsoukalas were both
 15 present that afternoon when Kyle loaded the barrels containing the ephedrine into the
 16 vehicle and that they were paid to bring the barrels across the border. Youngberg denied
 17 knowing the contents of the barrels, but conceded that he had a strong feeling that the
 18 materials were illegal. Youngberg further alleged that Kyle was going to pay for the
 19 transport service, but could not affirmatively say how much.

20 On May 15, 2004, Tsoukalas furnished the government with a proffer in which he
 21 claimed that Mr. Gianis was responsible for loading the barrels of ephedrine into the
 22 vehicle. Tsoukalas thereby avoided a ten year mandatory minimum sentence by
 23 implicating Mr. Gianis. Mr. Gianis was not in the vehicle transporting the ephedrine and
 24 there is no physical evidence connecting Mr. Gianis with the ephedrine.

25 On June 15, 2004, Tsoukalas, pursuant to a sealed Rule 11 plea bargain, pleaded
 26 guilty of one count of Conspiracy to Possess and Distribute Ephedrine.

27 Also on June 15, 2004, Youngberg entered into a sealed Rule 11 plea bargain in
 28 which he pleaded guilty to one count of misprision of felony.

29 **B. The Circumstances of Mr. Gianis's Arrest**

30 On December 28, 2007, Mr. Gianis arrived in Cancun, Mexico for a vacation, but
 31 the Mexican authorities denied his entry due to the warrant for his arrest in the United

1 States. The Mexican officials then placed Mr. Gianis on the next flight out of Cancun,
 2 Mexico- Jet Blue flight #B6762 to JFK International in New York. The ICE attaché in
 3 Mexico then contacted the ICE office at JFK about Mr. Gianis's impending arrival as
 well as background information.

4 When Jet Blue flight #B6762 arrived at JFK at 5:30 a.m., ICE agents were waiting
 5 for Mr. Gianis. The agents checked the passports of all the passengers in order to identify
 6 Mr. Gianis and then effectuated arrest after contact. When the ICE agents informed Mr.
 7 Gianis that he was being arrested pursuant to an arrest warrant from the Western District
 8 of Washington for conspiracy to distribute ephedrine, Mr. Gianis said something along
 9 the lines of: "I know about those guys getting arrested and clearly they are just trying to
 blame it on me."

10 Mr. Gianis was initially detained at the MDC facility in New York. His case was
 11 then removed to the Western District of Washington, where he has since been arraigned
 12 and detained pending trial pursuant to a hearing on February 6, 2008. Mr. Gianis entered
 13 a plea of not guilty.

14 **C. Events Since Arraignment and Detention**

15 Subsequent to arraignment and detention, the government expressed its intention
 16 to travel to Canada in order to try to perpetuate the testimony of Youngberg and
 17 Tsoukalas. Youngberg, however, suffers a mental disorder or disease, which was crucial
 18 towards the lenient plea bargain and sentence he received in relation to the crime initially
 charged. He is no longer in custody. According to the government, Youngberg at best
 "may be willing to voluntarily appear and testify, although he is less than enthusiastic
 19 about the prospect." Decl. of AUSA Vincent T. Lombardi, at Dkt. 14 at ¶7.

20 Tsoukalas was recently released from custody as well. When the government
 21 contacted his family to ask of Mr. Tsoukalas's whereabouts, Tsoukalas's mother told the
 22 government in no uncertain terms that Mr. Tsoukalas would offer no further assistance.
 23 Tsoukalas's mother pointed out that Mr. Tsoukalas has already served his time and
 24 fulfilled his obligations- he owes no debt to the government and is unwilling to assist the
 government pursue charges against Mr. Gianis. According to the government,
 Tsoukalas's mother "accus[ed] the United States government of having ruined her son's

1 life.” Id. at ¶8. The government asked Ms. Tsoukalas to contact her son and have him
 2 contact the government; this has yet to happen and is unlikely to do so.

3 **D. Mr. Gianis's Personal Characteristics**

4 Mr. Gianis has no criminal history in the United States, no criminal convictions in
 5 his home country of Canada, and has a full-time, well-paying job with his fiancé's father.
 6 In addition, Mr. Gianis resides with his fiancé, who also works full-time, in a family-
 7 oriented neighborhood in a house they own together and make mortgage payments on.
 8 They have two dogs and are working hard to make a wonderful home and life together.
 9 Mr. Gianis, moreover, has the full support of his family and lives in the same area as
 most of his immediate family members. Mr. Gianis's uncle, who lives in Arizona, has
 also volunteered to assist ensure that Mr. Gianis return for trial should the Court grant
 conditional release. See Ex. A, Letters of Support from Family.

10 **II. ARGUMENT**

11 Given Mr. Gianis's lack of any criminal history in the United States, his lack of
 12 any criminal convictions in his home country of Canada, the weak allegations against Mr.
 13 Mr. Gianis, the lack of physical evidence connecting Mr. Gianis to the charged offense, Mr.
 14 Mr. Gianis's stable employment, and the strong support from Mr. Gianis's family, the Court
 should order Mr. Gianis's conditional release pending trial.

15 Traditionally, federal law has provided that a person arrested for a non-capital
 offense “shall be admitted to bail.” United States v. Townsend, 897 F.2d 989, 993 (9th
 16 Cir. 1990). The Bail Reform Act of 1984, 18 U.S.C. §§ 3141, *et seq.*, thus mandates the
 17 release of the suspect unless no condition, or the least restrictive combination thereof,
 will “reasonably assure” both the appearance of the person as required as well as the
 18 safety of the community. United States v. Ward, 63 F.Supp.2d 1203, 1207 (C.D.Cal.
 19 1999); see 18 U.S.C. § 3142(c)(2); United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir.
 20 1991). Only in rare circumstances should courts deny release. Id.; Townsend, 897 F.2d
 21 at 993. Doubts regarding the propriety of release should be resolved in favor of release.
 22 Id.; Gebro, 948 F.2d at 1121.

23 With respect to the rebuttable presumption in favor of detention pursuant to 18
 24 U.S.C. § 3142(e), the defendant must produce only “some evidence” that he is not a flight
 risk and does not pose a danger to the community in order to rebut the presumption.

1 United States v. Chen, 820 F.Supp. 1205, 1207 (N.D.Cal. 1992); United States v. Dillon,
 2 938 F.2d 1412, 1416 (1st Cir. 1991) (burden placed on the defendant to rebut the
 3 presumption is small). Once the defendant offers some evidence in rebuttal, the
 4 presumption simply “retains evidentiary weight, and ‘the precise weight to be given the
 5 presumption’ is a matter that the judicial officer is to consider ‘within the framework of
 6 factors set out in § 3142(g).’” Ward, 63 F.Supp.2d at 1209 (quoting United States v.
 7 Jessup, 757 F.2d 378, 387 (1st Cir. 1985)).

8 The government, consequently, cannot rely solely upon the presumption to obtain
 9 pretrial detention, but rather must present to the court sufficient information pertaining to
 10 the relevant enumerated factors to actively persuade the court that the equities balance in
 11 favor of detention. Throughout the detention proceedings, the burden on the government
 12 remains one of persuasion by clear and convincing evidence. United States v. Clark, 791
 13 F.Supp. 259, 260 (E.D. Wash. 1992).

14 On appeal, or on a motion to reconsider, a court reviews the “[f]actual findings
 15 underlying a district court’s pretrial release or detention order, including whether a
 16 defendant is a flight risk or a danger to the public ... under the clearly erroneous
 17 standard, ‘coupled with an independent review of the facts, the findings, and the record to
 18 determine whether the order may be upheld.’” United States v. Fidler, 419 F.3d 1026,
 19 1029 (9th Cir. 2006); see also Gebro, 948 F.2d at 1121. Accordingly, the court must
 20 “make an independent examination of the record to determine whether the pretrial
 21 detention order is consistent with the defendant’s constitutional and statutory rights and
 22 arrive at [the] conclusion *de novo*.” Townsend, 897 F.2d at 994.

23 In this case, as described below, Mr. Gianis’s lack of awareness of the charge
 24 against him, stable employment, unflinching family support, and Mr. Gianis’s desire to
 25 face the charges against him in order to clear his name are more than sufficient to rebut
 26 the presumption of detention in this case.

27 **A. Information Unavailable at the Initial Detention Hearing**

28 As defense counsel became involved in this case only immediately prior to Mr.
 29 Gianis’s arraignment and detention hearing, Mr. Gianis was unable to fully present his
 30 argument in favor of conditional release. The Court should therefore grant another
 31 hearing in which Mr. Gianis can present additional evidence, particularly the strong

1 letters of support from his family and the fact that the government has neither physical
 2 evidence nor material cooperating witnesses implicating Mr. Gianis.

3 A court may reopen a detention hearing at any time before trial “if new
 4 information is discovered that has ‘a material bearing on the issue whether there are
 5 conditions of release that will reasonably assure the appearance of such person as
 6 required and the safety of any other person and the community.’” United States v.
7 Strong, 489 F.3d 1055, 1060 (9th Cir. 2007); see also Ward, 63 F.Supp.2d at 1206; 18
8 U.S.C. § 3142(f).

9 In Ward, the defendant sought review of a Detention Order on the specific
 10 ground that several immediate family members who were unavailable at the initial
 11 detention hearing stepped forward to assure his appearance at trial. Id. The court held
 12 that although the defendant’s family and relatives were obviously known to him at the
 13 time of his detention hearing, it was difficult for the defendant to secure their attendance
 14 on very short notice. The court found it relevant whether all of the relatives were
 15 contacted and available for the detention hearing and which relatives received notice; if
 16 not everyone received notice, they were unknown at the time of the initial hearing. Id. at
 17 1206-07.

18 Ward, therefore, is directly analogous to the situation presented here: after an
 19 initial determination of detention, the court reopened the detention issue because
 20 additional members of the defendant’s family came forward to ensure the defendant’s
 21 appearance at trial. Here, as Mr. Gianis’s family has had the time to compose letters to
 22 the Court detailing his community ties, financial resources, and economic and family
 23 stability, the Court should reconsider its determination of detention. See Ex. A.

24 **B. Risk of Flight**

25 Mr. Gianis is not a flight risk- he was unaware of the charges against him in the
 26 Western District of Washington and is now ready to face the allegations lodged by the
 27 admittedly guilty co-defendants and clear his name. In addition, Mr. Gianis’s family has
 28 written numerous letters in support of his pretrial release, thereby further militating
 29 against any assertion that Mr. Gianis is a flight risk.

30 The government bears the burden of proving, by a clear preponderance of the
 31 evidence, that there is no condition of release, or combination of conditions, that will

1 reasonably assure the defendant's appearance at trial if he is released on bond. United
 2 States v. Motamed, 767 F.2d 1403, 1406-07 (9th Cir.1985). However, "reasonably
 3 assure the appearance" of the defendant has not been construed to require an ironclad
 4 guarantee against flight. Ward, 63 F.Supp.2d at 1211; United States v. Portes, 786 F.2d
 5 758, 764 n. 7 (7th Cir. 1985); United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985);
United States v. Orta, 760 F.2d 887, 891-92 (8th Cir.1985).

6 Although Mr. Gianis is a Canadian citizen, "alienage does not by itself 'tip the
 7 balance either for or against detention.'" Townsend, 897 F.2d at 994 (citing Montamedi,
 8 767 F.2d 1408. In addition, the mere "opportunity" to flee is not enough to justify
 9 detention. United States v. Chen, 820 F.Supp. at 1208; United States v. Himler, 797 F.2d
 10 156, 162 (3d Cir. 1986). Finally, as Mr. Gianis has a full-time, well-paying job with his
 11 soon-to-be father-in-law and owns and pays the mortgage on a house with his fiancé, Mr.
 12 Gianis's home life is extremely stable so that he is not a flight risk. See Ex. A.

13 As the government has failed to fulfill its burden of affirmatively proving that Mr.
 14 Gianis is a flight risk, the Court should reopen the detention hearing and order Mr.
 15 Gianis's conditional release.

16 **C. Danger to the Community**

17 In contrast to assertions by the government, Mr. Gianis is not a danger to the
 18 community. Mr. Gianis has no criminal history in the United States; he has an uncle in
 19 Arizona who is willing to vouch for Mr. Gianis's intention to return to court for trial; and
 20 Mr. Gianis also has additional family in Canada who have provided letters detailing his
 21 stable family and employment circumstances. See Ex. A. The charges against Mr.
 22 Gianis, moreover, are at this stage of the proceedings merely allegations lacking any
 23 corroboration: "The government's burden of proof is not trivial" and it "must point to
 24 more than the indictment to justify detention"; the government "must prove by clear and
 convincing evidence that the defendant poses a danger to the community." United States
v. Chen, 820 F.Supp. at 1208 (citing Gebro, 948 F.2d at 1121).

Given the paucity of evidence in support the government's assertions that Mr. Gianis's was involved in any criminal activity in the United States, the Court should reconsider its determination.

1 It is of great significance that Mr. Gianis has the support of his family in facing
2 the charges against him. The defendant's father, mother, sister, girlfriend, and uncle have
3 now provided letters to the Court expressing their support of Mr. Gianis. See Ex. A.
4 With their supervision and their unwavering support, Mr. Gianis can be safely released
5 into the community subject to the conditions proposed by the defense. Should the Court
6 release Mr. Gianis into the custody of his family- subject to electronic home monitoring-
7 he will not pose a danger to the community.
8

9 The government basically filed charges against Mr. Gianis based solely on stale,
10 three year old testimony from two witnesses, both of whom were caught "red-handed"
11 with large amounts of ephedrine. The Court should not credit the overblown allegations
12 relied upon by the government in its exuberance to detain and prosecute Mr. Gianis. He
13 is neither a flight risk nor a danger to the community; the Court should therefore order his
14 conditional release pending trial.
15

16 III. CONCLUSION

17 For the reasons stated above, the defense respectfully requests that the Court order
18 a detention review hearing and conditionally release Mr. Gianis pending trial; the
19 defendant has overcome the rebuttable presumption of detention and the Government has
20 failed to prove by clear and convincing evidence that there is no combination of
21 conditions that will reasonable assure the defendant's appearance and the safety of the
22 community.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 14, 2008 I electronically filed Defendant Weldon Marc Gilbert's Motion for Reconsideration of Detention Order with the clerk of the court using the CM/ECF system which will send notification of such filing to the attorneys of record for the defendant and the government.

Dated this 14th day of March, 2008.

s/ Lisa A. Earnest
Lisa A. Earnest, Paralegal
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